IN THE

Supreme Court of the United States

October Term, 1977

No. 77-240

Supreme Court, U. S.
FILED
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ST PAUL FIRE & MARINE INSURANCE CO., AETNA CASUALTY & SURETY CO., TRAVELERS INDEMNITY OF RHODE ISLAND, TRAVELERS INDEMNITY CO. OF RHODE ISLAND, TRAVELERS INSURANCE CO., HARTFORD CASUALTY COMPANY and HARTFORD FIRE INSURANCE CO.,

v. *Petitioners,*

DAVID M. BARRY, M.D., LEROY S. CHAPNICK, M.D., WALTER C. COTTER, M.D., PAUL J. M. HEALEY, M.D., ANTHONY F. MERLINO, M.D., PAUL B. METCALF, M.D., H. GERALD ROCK, M.D., and ROSARIO V. TOMASELLI, M.D.,

and

PENNY ANDREW, CONSTANCE V. BOISSE, CHRISTOPHER DANIELS, ARTHUR M. FERLAND, GLADYS L. SPAIGHT, and ALPHONSE D. VITULLO,
Respondents.

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v.

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Respondents.

BRIEF FOR PETITIONERS

Petitioners St. Paul Fire & Marine Insurance Company, The Aetna Casualty and Surety Company, Hartford Casualty Company, Hartford Fire Insurance Company and Travelers Insurance Company ask this Court to reverse the judgment of the United States Court of Appeals for the First Circuit entered in this case on May 16, 1977.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is reported at 555 F.2d 3, 1977-1 Trade Cases (CCH) ¶61,431. The opinion of the United States District Court for the District of Rhode Island, which dismissed plain-

tiffs' antitrust claim, has not been reported.* The District Court and Court of Appeals opinions are reproduced at pages 39-50 and 51-71 of the Appendix. The dissenting opinion of Judge Campbell may be found at pages 72-75 thereof.

Jurisdiction

The Court of Appeals entered judgment on May 16, 1977. A petition for a writ of certiorari was timely filed on August 12, 1977. Certiorari was granted on October 31, 1977. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. §1 (Supp. V, 1975):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 1 of the McCarran-Ferguson Act, 15 U.S.C. §1011 (1970):

> "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

* In a second opinion, entered on March 19, 1976, the District Court dismissed state law claims asserted by plaintiffs in a second amended complaint. That opinion was affirmed by the Court of Appeals for the First Circuit and review of that aspect of the decision has not been sought.

Section 2 of the McCarran-Ferguson Act, 15 U.S.C. §1012 (1970):

> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; *Provided,* That after June 30, 1948, the . . . Sherman Act, and the . . . Clayton Act, and . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Section 3 of the McCarran-Ferguson Act, 15 U.S.C. §1013 (1970):

> "(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.
>
> "(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

Question Presented

This case presents an important question concerning the scope of the antitrust exemption conferred on the business of insurance by the McCarran-Ferguson Act.

The Court is asked to resolve a conflict among the circuits concerning the extent to which an exception to the Act for "boycott, coercion or intimidation" may be used to overcome the antitrust exemption and involve federal courts in controversies between policyholders and insurance companies concerning the terms of insurance, notwithstanding the policy of the Act to leave such controversies to state regulation.

The question presented is whether the boycott exception may be read to permit policyholders dissatisfied with the terms of insurance to convert their grievances into a federal antitrust suit by alleging a concerted refusal by insurance companies to sell them the coverage they want.

Statement of the Case

1. Introduction

The McCarran-Ferguson Act was enacted in 1945 in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which, for the first time, held that the federal antitrust laws applied to the business of insurance. The Act was designed in part to reverse that decision and "turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969).

To that end, the Act renders the Sherman Act and other federal antitrust laws inapplicable to the business of insurance, to the extent regulated by the states, except where the conduct challenged involves "boycott, coercion or intimidation."

In this case, the First Circuit adopted an interpretation of the boycott exception which threatens to nullify the antitrust exemption and, in the words of the dissenting opinion, "reintroduce by the back door most of the Sherman Act" to the area of insurer-insured relations which Congress sought to leave to state regulation. (555 F.2d at 14-15, A. 73-74.)

In a two-to-one decision, the First Circuit held that Rhode Island physicians could bring a federal antitrust suit charging that the allegedly high cost and limited scope of medical malpractice coverage were the result of an insurance company conspiracy. The First Circuit held that the McCarran-Ferguson antitrust exemption was no bar to this suit because allegations characterizing the alleged conspiracy as a concerted refusal to deal with the policyholders brought the case within the boycott exception.

All other courts which have considered the issue have reasoned that such a reading of the boycott exception would swallow up the rule since virtually every Sherman Act conspiracy could be framed in the language of a concerted refusal to deal. Therefore, in order to give meaning to the antitrust exemption, these courts have limited the exception

to blacklists and other coercive tactics directed at insurance companies and agents—Congress' main concern at the time it enacted the exception—or to similar conduct undertaken to restrict the competitive practices of other traders.

In rejecting these limitations, the First Circuit has virtually read the Sherman Act exemption out of the McCarran-Ferguson Act and has converted the federal antitrust laws into a remedy for policyholder grievances heretofore considered to be within the exclusive domain of the states. As shown below, neither the common meaning of the term "boycott," nor the history of the boycott exception, nor the overall policy of the Act, justifies this result.

2. The Antitrust Allegations

Plaintiffs purport to represent a class of Rhode Island physicians and a class of their present or prospective patients. The first count of their amended complaint (A. 15-30), brought under the Sherman Act, alleges a conspiracy among St. Paul, by whom the plaintiff physicians had been insured for malpractice, and Aetna, Hartford and Travelers.

According to the complaint, in April, 1975, St. Paul announced that it would not renew medical malpractice coverage on an "occurrence" basis and would issue new coverage only on a "claims made" basis.* Plaintiffs allege that thereafter Aetna, Hartford and Travelers refused to issue any malpractice coverage to physicians previously covered by St. Paul, as part of a collective effort to deny St. Paul policyholders medical malpractice coverage on an "occurrence" basis. (A. 24-25.)

* An "occurrence" basis policy covers claims arising out of acts occurring during the term of the policy even when the claim is made after the policy expires. "Claims made" policies cover only claims actually asserted while the policy is in force, thus precluding liability for potential claims after the policy expires.

The complaint also describes the alleged conspiracy as an agreement not to compete, price-fixing and unfair discrimination between insureds, and contains the customary recitation in cases of this kind, that the conduct alleged amounted to boycott, coercion and intimidation. (A. 27.)

Plaintiffs seek damages and equitable relief, including an injunction prohibiting the insurance companies from denying plaintiffs "medical malpractice insurance on an 'occurrence basis' at reasonable rates. . . ." (A. 28.)

3. The Decisions Below

The District Court granted a motion to dismiss these antitrust allegations, holding that they were barred by the McCarran-Ferguson exemption. There was no dispute that the conduct alleged related to the "business of insurance." Nor was there any question that the conduct was regulated by Rhode Island.

Rhode Island has a comprehensive code regulating the terms and rates of insurance and all other phases of the insurance business, including anticompetitive and unfair practices.

More specifically, Rhode Island has undertaken a major effort to remedy problems in the cost and availability of medical malpractice insurance through special emergency

regulation. Commencement of this suit virtually coincided with the formation by Rhode Island of a Joint Underwriting Association ("JUA"), which took over the business of writing medical malpractice coverage in Rhode Island. The JUA was granted full authority to establish terms and rates for such coverage, pending the outcome of a study undertaken by a Governor's Commission on Medical Malpractice Reform.*

Plaintiffs argued, however, that the McCarran-Ferguson Act did not preclude them from seeking a separate federal solution because, they contended, the conduct alleged came within the boycott exception. The District Court rejected this argument, relying on the Fifth Circuit's decision in *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975), and the Ninth Circuit's decision in *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

These Courts of Appeals held that the legislative history of the boycott exception indicated that Congress intended to exclude only a limited type of activity from the otherwise broad antitrust exemption. They read this history as showing that Congress added the boycott exception primarily to deal with insurance company conspiracies which used blacklists and similar punitive acts to exclude other

* The JUA was created by Emergency Regulation XXI, R.I. Dep't of Business Regulation, Insurance Division, June 16, 1975 (A. 114-27), and received express legislative sanction in R.I. Gen. Laws §42-14.1-1 (A. 106-10). Rhode Island's comprehensive regulation of the business of insurance in general is illustrated by R.I. Gen. Laws §§27-9-4, 27-9-7, 27-9-15, 27-9-16, 27-9-18, and 27-9-19, setting forth requirements and procedures for state approval of the terms of insurance policies (A. 86-90), and by R.I. Gen. Laws §§27-29-1 *et seq.*, broadly prohibiting "unfair competition and practices" in the "business of insurance" (A. 92-105).

insurance companies or agents from the insurance business, or to compel them to conform their competitive practices to rules laid down by the conspiracy.

The District Court adopted the reasoning of these Courts of Appeals that to read the exception to encompass policyholder complaints about the unavailability of insurance on terms which they desired "would be contrary to the legislative history of the Act," and " 'would vitiate the McCarran-Ferguson Act in its concept of setting over unto the several states the regulation, and protection of the insurer-insured relationship.' " (A. 45.) By the time the appeal from the District Court reached the First Circuit, at least six additional district courts had adopted the Fifth and Ninth Circuit construction of the boycott exception.

The First Circuit rejected these decisions and reversed. Over Judge Campbell's dissent, it held that the allegations of a concerted refusal to deal with policyholders brought the case within the boycott exception.

The First Circuit majority concluded that the prior decisions were in error for two reasons: First, the Court held that the earlier decisions erroneously went behind the words of the boycott exception and relied upon its legislative history. In the majority's view, the "plain meaning" of the phrase "boycott, coercion and intimidation" encompassed policyholder claims of "[c]oncerted refusals by a number of companies to sell malpractice insurance policies to doctors who were dissatisfied with the policies offered by their insurer . . . ." (555 F.2d at 7-8, 11, A. 57-58, 66.)

The majority seemed to acknowledge that under its reading the only Sherman Act claims which could not be brought within the boycott exception were acts of individual monopolists, such as predatory pricing and the use of "benign" means to maintain a monopoly. (555 F.2d at 8, A. 59.) It concluded, however, that this would not result in undue interference with state regulation since, in its view, the states could still enact regulations specifically authorizing conduct otherwise covered by the boycott exception—not because of the McCarran-Ferguson Act, but under the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943).

Second, the majority concluded that the prior decisions had misread the legislative history of the boycott exception when they found that Congress was solely concerned with a system of boycotts and blacklists aimed at forcing insurance companies and agents to conform to a system of industry self-government. The majority conceded that the legislative history made no mention of boycotts, coercion or intimidation aimed at consumers, and that the history disclosed that "the vice of insurance company self-government outside the law obviously lay in [the legislators'] minds as a major evil . . . ." (555 F.2d at 12, A. 67.) It concluded, however, that "there is no suggestion that the legislation was limited to that evil." (*Id.*)

Judge Campbell entered a vigorous dissent. In his view, the majority's interpretation of the exception rendered virtually meaningless the McCarran-Ferguson exemption from the Sherman Act:

> "[U]nder the clear implication of §1012, neither the Sherman Act nor the other antitrust laws apply

> except insofar as the §1013(b) exception permits. That exception provides, 'Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.' Significantly this language does not track the broad 'contract, combination . . . or conspiracy' language of the Sherman Act which Congress reasonably might have chosen had the intent been, as my brothers state, to encompass in the exception virtually all activities in violation of the Sherman Act involving more than an individual monopolist.
>
> ". . . Indeed to read §1013(b) expansively is to hold that what Congress gave with one hand it took with the other, since while my brothers' reading does not introduce the entirety of federal antitrust law into the business of insurance, it introduces a very major part thereof and does so with no clear explanation of why Congress should first take pains to eliminate the antitrust laws and then reintroduce by the back door most of the Sherman Act." (555 F.2d at 14-15, A. 72-74.)

Moreover, Judge Campbell viewed the majority decision as subversive of the main objective of the McCarran-Ferguson Act:

> "The central thread running through the McCarran-Ferguson Act is that regulation of insurance rates and policies—both of them matters falling under the general heading of relations between companies and policyholders—is left to the states. The present litigation brought by physicians who believe that they have been deprived, unfairly, of insurance on terms that are economically favorable focuses precisely upon company-policyholder matters. My brothers are now putting the federal courts in the same arena as the State of Rhode Island, contrary, I believe, to the pur-

pose of the McCarran-Ferguson Act. Doubtless the federal perspective is somewhat different but the potential for conflict between state regulation and federal antitrust policies is real and the decision has the effect of substantially undercutting §1012(b) of the Act." (555 F.2d at 15, A. 74-75.)

Finally, Judge Campbell's dissent noted with concern the radical change which the majority's interpretation effected in the role of the federal courts and its potential impact on state regulation of insurance:

> "This is, I think, a most unfortunate decision. It not only introduces a new category of federal antitrust suit which will be very difficult to manage at a time when federal courts are strained to the limit, but it could have unforseeable effects upon state regulatory policies. Plaintiffs may see this case as another string to their bow in attempting to deal with the crushing malpractice burdens being imposed as the result not only, perhaps, of predatory insurance practices but of inflated claims and verdicts. We might sympathize with them without going this far. The State of Rhode Island has apparently now enacted regulatory legislation dealing with some or all of the problem—a means of redress which seems far more responsive to the problem than any likely to be achieved through reinterpreting the McCarran-Ferguson Act thirty years after enactment." (555 F.2d at 15, A. 75.)

Summary of Argument

The "plain meaning" of the term boycott does not compel the First Circuit's novel interpretation of the boycott exception. This Court has used the term boycott in decisions under the Sherman Act to apply to concerted refusals to deal which were designed to exclude some trader from

competition with one or more of the conspirators or to compel a trader to conform its competitive practices to terms dictated by the conspiracy. The term "boycott" has never been used to apply to conduct of the kind complained of here, involving no more than an alleged voluntary agreement by insurance companies to fix the terms of their product or to refrain from competing for each other's customers.

As all other courts have recognized, to bring such conduct within the boycott exception by characterizing it as a concerted refusal to deal with policyholders would erase all distinctions between alleged conspiracies concerning the terms of insurance, which Congress plainly intended to include within the McCarran-Ferguson antitrust exemption, and the conduct covered by the boycott exception. The exception would thus effectively swallow up the entire antitrust exemption and subvert the main purpose of the act: to bar application of the federal antitrust laws where the states regulate the relations between policyholders and insurance companies.

The limitations imposed on the boycott exception by these other courts find support in the history of the McCarran-Ferguson Act and prior decisions of this Court. More important, they define the exception in a manner which gives meaning to the entire Act. Accordingly, the First Circuit's interpretation of the boycott exception should be rejected, and the exception should be limited to cases where concerted refusals to deal are used to exclude or penalize insurance companies or other traders which refuse to conform their competitive practices to terms dictated by the conspiracy.

ARGUMENT

I

The First Circuit's interpretation of the boycott exception would encompass almost every conspiracy proscribed by the Sherman Act and thus nullify the Sherman Act exemption provided by the McCarran-Ferguson Act.

There is no question that the McCarran-Ferguson Act was designed to render the Sherman Act inapplicable to the business of insurance except in limited circumstances.

Section 3(a) of the McCarran-Ferguson Act (15 U.S.C. §1013(a)) specifically provides that "the Sherman Act . . . shall not apply to the business of insurance or to acts in the conduct thereof" for a period ending June 30, 1948. This Sherman Act exemption is extended indefinitely by section 2(b) of the McCarran-Ferguson Act (15 U.S.C. §1012(b)) in any state which, like Rhode Island, has undertaken to regulate the business of insurance.

Hence, the exception for "boycott, coercion or intimidation" must be limited to a defined class of conduct which does not encompass every "contract, combination . . . or conspiracy" covered by the Sherman Act. Otherwise, the provisions of the McCarran-Ferguson Act rendering the Sherman Act inapplicable to the business of insurance would have no meaning.

The First Circuit adopted an interpretation of the boycott exception which ignores this fundamental proposition.

It held that the boycott exception applies to any conspiracy which can be characterized as a concerted refusal to deal, thus allowing the exception to encompass virtually every conspiracy proscribed by the Sherman Act.

As Professor Sullivan has said, "the phrase 'concerted refusal to deal' is too imprecise to be very useful as a legal category. . . . Literally, it covers arrangements which are very different from boycotts and which should be analyzed quite differently." Sullivan, *Handbook of the Law of Antitrust* 231 (1977). And Professor Areeda has noted that "one might even hold that any agreement affecting competitive behavior is necessarily an agreement that the collaborators will not buy or sell on any other terms; and there is no sharp logical distinction between refusing to sell at all and refusing to sell except on condition." Areeda, *Antitrust Analysis* 380-81 (2d ed. 1974).* Thus, allowing the applicability of the boycott exception to turn on the allegation of a "concerted refusal to deal" alone will erase the distinction between boycotts and other categories of conduct expressly exempted from the Sherman Act by the McCarran-Ferguson Act.

For example, an agreement establishing uniform risk classifications can be characterized as a concerted refusal to deal with persons found to be unacceptable risks. An agreement not to compete can be transformed into a concerted refusal to deal with another's customers. An agreement not to engage in product competition can be described as a refusal to sell products differing from those agreed upon. And a price fixing conspiracy can be cast in terms

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* *See also* Barber, *Refusals To Deal Under The Federal Antitrust Laws*, 103 U.Pa.L.Rev. 847, 876-77 (1955).

of a concerted refusal to deal except on terms dictated by the conspirators.

Here the First Circuit held that an alleged conspiracy whereby one insurer offered to renew malpractice coverage to its policyholders on terms less favorable than those offered in the past, and whereby other insurers refused to sell to those policyholders when they sought to obtain new coverage elsewhere, came within the boycott exception. But this conduct could more conventionally have been described as an agreement to fix the terms of malpractice coverage or as an agreement between the insurance companies not to compete for each other's customers. Indeed plaintiffs use these very terms to characterize the alleged conduct, in addition to calling it a "boycott." (A. 27.)

Every other court confronted with similar attempts by policyholders to bring grievances about the terms of their insurance within the boycott exception has sought to avoid the anomaly which the First Circuit's interpretation produces. These courts have looked to the historical and legislative background of the McCarran-Ferguson Act to find an appropriate limitation on the boycott exception which would prevent it from swallowing up the antitrust exemption.

For example, in *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975), *aff'g* 372 F.Supp. 509 (S.D. Tex. 1974), policyholders complained that their insurance company refused to renew an automobile liability policy on terms which they thought reasonable, and that all other insurers within the state conspired with that company to refuse to sell policies to them on their former, more advantageous terms. In an effort to bring their claim within the boycott exception, plaintiffs framed their claim as a collective refusal to deal, except on terms which the insurance companies dictated. The District Court rejected the attempt. In its view, the legislative history of the boycott exception revealed that Congress was primarily seeking to deal with conspiracies among insurance companies to boycott or refuse to deal with other insurance companies and agents. It found nothing to suggest that the boycott exception was intended to apply to "a refusal by insurance companies to deal with particular segments of the public except under fixed classifications and premium rates." (372 F.Supp. at 513-14.)

On appeal, the Fifth Circuit unanimously affirmed, stating that:

> "[Plaintiff's] broad construction of Section 1013(b) would emasculate the antitrust exemption contained in Section 1012(b) of the McCarran-Ferguson Act. We affirm the district court's holding that the boycott exception does not apply." (506 F.2d at 734.)

The Fifth Circuit's view has also been adopted by the Ninth Circuit in *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975), and the Third Circuit implicitly adopted this construction in its *per curiam* affirmance in *Frankford Hospital* v. *Blue Cross of Greater Philadelphia*, 417 F. Supp. 1104 (E.D. Pa. 1976), *aff'd*, 554 F.2d 1253 (3d Cir.), *cert. denied*, 46 U.S.L.W. 3218 (U.S. Octo-

ber 4, 1977). In addition, ten District Court decisions have adopted the same construction.*

A somewhat different approach—which also avoids the anomalous results produced by the First Circuit's interpretation—recently was advanced by the District of Columbia Circuit in *Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 561 F.2d 262 (D.C. Cir. 1977), *petition for cert. filed*, No. 77-580, 46 U.S.L.W. 3294 (U.S. October 19, 1977).**

Proctor involved a suit by tradesmen in the auto repair business who claimed that insurance companies conspired with other auto repairmen to limit payments made to insureds for auto repairs covered by their automobile insurance contracts. Plaintiffs claimed that the effect of this conspiracy was to limit the prices they could charge these policyholders for auto repairs. A principal issue in *Proctor* was whether the auto repairmen's claim that the conspiracy involved a collective refusal to deal except at fixed terms

* *Pierucci* v. *Continental Casualty Co.*, 418 F. Supp. 704 (W.D. Pa. 1976) (involving an attack on "claims made" policies similar to the one involved here); *Ohio* v. *Ohio Medical Indemnity, Inc.*, 1976-2 Trade Cases (CCH) ¶61,128 (S.D. Ohio 1976); *Mathis* v. *Automobile Club Inter-Insurance Exchange*, 410 F. Supp. 1037 (W.D. Mo. 1976); *Royal Drug Co.* v. *Group Life and Health Insurance Co.*, 415 F. Supp. 343 (W.D. Tex. 1976), *rev'd on other grounds*, 556 F.2d 1375 (5th Cir. 1977); *Pastor* v. *Hartford Fire Insurance Co.*, 1976-1 Trade Cases (CCH) ¶60,783 (C.D. Cal. 1976), appeal docketed No. 77-1243 (9th Cir. January 26, 1977); *McIlhenny* v. *American Title Insurance Co.*, 418 F. Supp. 364 (E.D. Pa. 1976); *Workman* v. *State Farm Mutual Automobile Insurance Co.*, Civil No. 75-1799 (N.D. Cal. September 16, 1976), appeal docketed No. 76-3549 (9th Cir. December 1, 1976); *Seasongood* v. *K&K Insurance Agency*, 414 F. Supp. 698 (E.D. Mo. 1976), *rev'd on other grounds*, 548 F.2d 729 (8th Cir. 1977); *Mitgang* v. *Western Title Insurance Co.*, 1974-2 Trade Cases (CCH) ¶75,322 (N.D. Cal. 1974); and *Transnational Insurance Co.* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966).

** The petition in *Proctor* does not present an issue concerning the scope of the boycott exception.

fell within the boycott exception. The District of Columbia Circuit found that it did not.

Although the Court was unwilling to accept the Fifth and Ninth Circuits' view that the boycott exception was limited to boycotts of other insurance companies and their agents, it did "recognize that the terms of the [boycott] provision are not self-defining, and are capable of being read in such a way as to swallow the antitrust exemption ...." (561 F.2d at 274.) It recognized, for example, that a price-fixing conspiracy could "perhaps be characterized as a collective refusal to deal except at the prevailing rate." (*Id.*) But, it also found that the boycott exception could not be read so expansively because the legislative history clearly indicated that price-fixing was not considered a boycott, and that such conduct fell squarely within the McCarran-Ferguson exemption. (*Id.*)

The District of Columbia Circuit looked to the conduct described by the words boycott, coercion and intimidation in *South-Eastern Underwriters*,* and limited the boycott exception to the type of punitive conduct used by the conspirators in that case to exclude from the market traders who would not conform their competitive practices to rules laid down by the conspiracy. This reading differs from the Fifth and Ninth Circuits' construction in that it allows the boycott exception to be applied to acts aimed at excluding or coercing the competitive practices of traders outside the insurance industry. But, like the Fifth and Ninth Circuits' construction, it would distinguish between boycotts and other Sherman Act conspiracies. Under *Proctor*, the boy-

* *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

cott exception would not encompass allegations, like those here, involving no more than a claim that competitors voluntarily entered into a horizontal conspiracy to restrain competition among themselves—even if the conspiracy were styled as a concerted refusal to deal.

The different approach taken by the First Circuit reflects its initial premise that the "plain meaning" of the term "boycott" encompasses every conspiracy which can be characterized as a concerted refusal to deal. Even if this premise were correct, the First Circuit was not justified in adopting an interpretation of the except on which emasculates the express Sherman Act exemption conferred by the McCarran-Ferguson Act. As this Court has said, "[t]he process of interpretation . . . misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve." *Markham* v. *Cabell,* 326 U.S. 404, 409 (1945). As we show in Point II, however, the First Circuit was mistaken in its premise. Its all-encompassing reading of the exception was not compelled by the "plain meaning" of the term "boycott" as used by this Court in cases under the Sherman Act. In fact, the limitations on the boycott exception imposed by other courts are more consistent with the meaning of the term "boycott" as used by this Court, than is the interpretation adopted by the First Circuit.

II

The "plain meaning" of the word boycott does not warrant an interpretation of the boycott exception which swallows up the McCarran-Ferguson antitrust exemption.

This Court has never used the term boycott to characterize conduct of the kind alleged here involving voluntary agreements among competitors to restrict competition among themselves, even though such arrangements could be characterized as a collective refusal to deal. The hallmark of every boycott case decided by this Court under the Sherman Act has been the use of a concerted refusal to deal for the purpose of excluding the target of the boycott from competition with one or more of the conspirators or restraining the competitive practices of the target.*

A perfect illustration is *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), which the First Circuit mistakenly read to support its broad definition of boycott. (555 F.2d at 7, A. 57.) In that case, Broadway-Hale, a retail department store chain, sought to prevent Klor's from competing with one of its stores in the sale of appliances. To that end Broadway-Hale induced appliance manufacturers to refuse to sell to Klor's or to sell to Klor's only on terms which put it at a disadvantage to Broadway-Hale. Such exclusionary activity, this Court held, fell within the category of "group boycotts, or con-

* Barber, *Refusals to Deal Under the Antitrust Laws,* 103 U.Pa. L.Rev. 847, 876-77 (1955); Note, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule,* 71 Nw.U.L.Rev. 818 (1977).

certed refusals by traders to deal with other traders." (359 U.S. at 212.)

Similarly, in *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), franchised automobile dealers sought to eliminate competing automobile "discount houses" by inducing General Motors to take action to prevent discounters from obtaining cars. The conduct condemned as a boycott involved "joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and [the] minority of Chevrolet dealers [which sold cars to discounters] and to deprive franchised dealers of their freedom to deal through discounters if they so chose." (384 U.S. at 140.)

It was the "[e]limination, by joint collaborative action, of discounters from access to the market" (384 U.S. at 145), and acts undertaken for the purpose of "exclu[ding] traders from the market by means of combination or conspiracy" (384 U.S. at 146), which led this Court to characterize the conduct as an illegal boycott.

Again, in *Fashion Originators' Guild of America* v. *FTC*, 312 U.S. 457 (1941), dress designers and manufacturers which were members of the Guild were accused of conspiring to use the coercive force of a group boycott to eliminate competition from manufacturers that copied defendants' designs and undercut defendants' prices. In describing the conduct which it condemned as a group boycott, the Court said:

> "[P]etitioners, while continuing to compete with one another in many respects, combined among themselves to combat and, if possible, destroy all competition from the sale of garments which are copies of their 'original creations.' They admit that to destroy such competition they have in combination purposely boycotted and declined to sell their products to retailers who follow a policy of selling garments copied by other manufacturers from designs put out by Guild members. . . ." (312 U.S. at 461.)

All other boycott cases decided by this Court—like those described above—have involved concerted refusals to deal which had as their objective the exclusion of competitors or the restriction of the target's competitive practices. *See, e.g., Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914) (retail lumber dealers "blacklisted" wholesalers who attempted to sell to consumers in competition with the conspiring dealers); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (gas burner manufacturers induced a trade association to withhold a seal of approval from products manufactured by one of their competitors, thus making it impossible for that manufacturer to sell burners in competition with the conspirators); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) (members of the New York Stock Exchange cut off wire service to a competing non-member broker). *See also, Associated Press* v. *United States*, 326 U.S. 1, 15-16 (1945) (member newspapers of the Associated Press excluded non-members from access to news coverage so as to impair the ability of these non-member newspapers to compete with the conspirators).

Here, no conduct comparable to that involved in these boycott cases is alleged. Nothing more is alleged than a conspiracy among insurance companies to voluntarily limit

competition among themselves. There is no allegation that the coercive force of a refusal to deal was brought against any insurance company to compel it to join the alleged conspiracy. Nor is there any allegation that the refusal to deal was induced by some physicians in order to eliminate the competition of doctors insured by St. Paul.

Accordingly, the First Circuit was in error when it concluded that the conduct involved here fell within the "plain meaning" of the term "boycott." Nothing in the plain meaning of the term boycott warrants an interpretation of the boycott exception which would bring virtually every "contract, combination . . . or conspiracy" covered by the Sherman Act within the boycott exception.

III

The history of the boycott exception shows that it is limited to concerted refusals to deal aimed at excluding insurance companies or other traders from competition or restricting their competitive practices.

The history of the boycott exception demonstrates that the conduct with which Congress was concerned was of the same type as that described in the boycott cases and that Congress did not intend to bring within the exception conduct of the type alleged here.

The phrase "boycott, coercion or intimidation" appears to have been taken by Congress from this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which led to the enactment of the McCarran-Ferguson Act. There, the Court used the words

boycott, coercion and intimidation to apply to conduct of the type involved in *Fashion Originators' Guild, Klor's,* and all other boycott cases decided by this Court.

South-Eastern Underwriters involved a conspiracy among members of a trade association of insurance companies and agents to establish the terms on which fire insurance could be sold. In addition, the conspirators agreed to the use of boycotts, blacklists and other punitive activity to coerce competing insurance companies and agents to adhere to those terms and exclude from competition companies and agents which were not members of the association or which would not sell insurance on the terms fixed by the conspiracy.

This Court distinguished between the agreements among the conspirators to fix the terms on which insurance would be sold and the coercive measures adopted by the conspirators to force other insurance companies and agents into the conspiracy or out of the business. It was only to this latter category of activity to which the words boycott, coercion and intimidation were applied.

Thus the Court said:

> "The conspirators *not only fixed premium rates* and agents' commissions, but employed *boycotts* together with other types of *coercion and intimidation* to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms. Companies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-S.E.U.A. com-

panies were punished by a withdrawal of the right to represent the members of S.E.U.A.; and persons needing insurance who purchased from non-S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage." (322 U.S. at 535-36.) (Emphasis supplied.)*

A review of the legislative history of the McCarran-Ferguson Act shows that the exception for "boycott, coercion or intimidation" was intended to deal with the same type of conduct which this Court characterized by those words in *South-Eastern Underwriters.*

Thus, Senator O'Mahoney, one of three Senators on the Conference Committee which drafted the boycott exception, stated its object and origins as follows:

> "The vice in the insurance industry, Mr. President, was not that there were rating bureaus [which fixed rates], but that there was in the industry a system of private government which had been built up by a

* The First Circuit seized upon this Court's references in this quotation to acts against consumers, to demonstrate that the conduct alleged here falls within the conduct comprehended by this Court's use of the words "boycotts . . . coercion and intimidation." (555 F.2d at 11, A. 66-67.) In context, however, it is clear that the targets of the conspiracy were not the policyholders but the non-member insurance companies and agents. The refusals to sell to policyholders were only part of the effort to pressure non-member insurance companies and agents into conformity or withdrawal from the market.

The First Circuit was similarly mistaken in relying upon *Washington State Bowling Prop. Ass'n* v. *Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966). (555 F.2d at 8-9 n.4, A. 58 n.4.) There, the owner of a bowling establishment brought suit against competing establishments and their trade association alleging that defendants conspired to "deprive non-member establishments of the patronage of persons who wish to engage in organized bowling, to enforce a boycott against non-member establishments, and thereby to suppress competition and monopolize the bowling industry." (356 F.2d at 374.)

> small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce. These private groups sought, by the imposition of penalties, by writing rules and regulations, and by holding secret trials, or at least claiming the right to do so, to enforce not public regulations written by public authority but regulations for the insurance business which they wrote themselves in their wholly private and exclusive associations.
>
> • • •
>
> "The Insurance Executives Association undertook by regulation to coerce, intimidate, and boycott its own members and compel them to obey the rules and regulations the association itself prescribed." (91 Cong. Rec. 1485-86 (1945).)

Senator O'Mahoney then read from the regulations of the Association which provided for the imposition of penalties including expulsion from membership, the payment of fines, and withdrawal of certain business should members disobey the Association's directives, and concluded that

> "such is the record of one agreement to coerce and intimidate persons engaged in the insurance business.
>
> • • •
>
> "[T]his proposed act leaves wholly undisturbed, indeed, it fortifies the decision of the Supreme Court that insurance is commerce. It leaves the antitrust laws in full force and effect, even during the moratorium period, against boycotts and agreements to boycott. As I was saying, it is a matter of confronting the facts or arguing on theory. There are agreements and combinations in the public interests which can safely be permitted, but this agreement from which I have been

> reading is the sort of agreement which ought to be condemned, which ought to be outlawed, and which, in the language of section 3(b) of the conference report, which the Senator has now read, would be completely outlawed. I refer to the prohibition against agreements to coerce or intimidate." (91 Cong. Rec. 1486 (1945).)

Throughout the debates, Senator O'Mahoney repeatedly answered questions about the scope of the boycott exception by referring to coercive conduct which had been employed by the insurance industry to compel conformity to its private rules and regulations. For example at one stage of the discussion he stated:

> "Therefore any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision [the "boycott" exception]." (91 Cong. Rec. 1480 (1945).)

He again explained:

> "Mr. President, there are three forms of regulation. There is State regulation, concerning which the Senator from Maryland has spoken so clearly. There is Federal regulation as a legal possibility, but no one is urging it now.
>
> "The third, and this has been harmful to the public interest, is regulation by private combinations and groups; a type of regulation which has been enforced by private combinations and groups through private rules and regulations under which persons engaged by the insurance industry could be tried and convicted for the violation of private law. That type of regulation would be absolutely outlawed should the conference report be adopted." (91 Cong. Rec. 1483 (1945).)

Even the First Circuit majority recognized that the legislative history shows that "the vice of insurance company self-government outside the law obviously lay in [the legislators'] minds as a major evil to be combatted by the legislation . . ." (555 F.2d at 12, A. 67) and that "it is true that at no point were any remarks directed to the possibility of boycotts, coercion or intimidation aimed at consumers." (555 F.2d at 11, A.66.) The legislative history provides no support for the First Circuit's conclusion that the boycott exception was intended to be an "all purpose safety valve" (555 F.2d at 11-12, A. 67) which would sweep within the exception virtually every Sherman Act conspiracy, notwithstanding the express exemption conferred by the McCarran-Ferguson Act.

This Court has recognized that "words" used in statutes "acquire scope and function from the history of events which they summarize." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 186 (1941). The legislative debates show that in enacting the boycott exception Congress was concerned with blacklists and similar punitive measures used by members of an industry to compel other traders to conform their competitive practices to those dictated by the conspiracy or to be excluded from competition. This was the conduct characterized as a boycott in *South-Eastern Underwriters* and other boycott cases that have been decided by this Court under the Sherman Act.

The sound approach to this history is the one suggested by Judge Campbell in his dissent:

> "Certainly, in the expressed concerns of the legislators there is explicit support for the view which all other

courts have adopted to date. More important to me, however is the statutory scheme which suggests in the positioning of the exception, and in the very fact that the exception is just that, that §1013(b) should be construed in a manner complementary to, rather than subversive of, the major premises of the Act. Under my brothers' reading, the tail now wags the dog." (555 F.2d at 15, A. 75.)

Even if the Fifth and Ninth Circuits read the legislative history too rigidly in limiting the boycott exception to conduct directed only at insurance companies and insurance agents, the broad construction adopted by the First Circuit would not be appropriate. It might not do violence to the legislative history to also apply the exception to coercive conduct of the sort described in *South-Eastern Underwriters* and the legislative debates where such conduct is used to compel traders in other industries to conform their competitive practices to the terms of a conspiracy.

The First Circuit, however, has gone substantially farther, and has interpreted the boycott exception in a way which cannot be supported by the boycott cases decided by this Court or by the history of the exception's language. Instead, the First Circuit has employed a novel definition of the term which would encompass virtually every "contract, combination . . . or conspiracy" covered by the Sherman Act, thus emasculating the McCarran-Ferguson antitrust exemption.

IV

The First Circuit's interpretation of the boycott exception is inconsistent with the overall purpose of the McCarran-Ferguson Act to leave the protection of policyholders to state regulation.

We have demonstrated that the language of the boycott exception and its history compel an interpretation which gives meaning and scope to the antitrust exemption, and that the "plain meaning" of the term boycott does not justify the anomalous result reached by the First Circuit.

The First Circuit's interpretation must also be rejected because it disregards this Court's direction that "[a]ll statutes must be construed in the light of their purpose." *Haggar Co.* v. *Helvering,* 308 U.S. 389, 394 (1940). Here, the First Circuit adopted a construction which subverts the main purpose of the McCarran-Ferguson Act.

The First Circuit mistakenly believed that its expansive reading of the boycott exception was justified by the "national purpose" of "preserving competition by means of the antitrust laws" and that "[t]o exclude consumers of insurance from the protection afforded by the boycott provision thus cuts against a basic policy of antitrust law." (555 F.2d at 9, A. 60-61.) The First Circuit lost sight of the fact that Congress enacted the McCarran-Ferguson Act precisely in order to withdraw the Sherman Act and other antitrust laws from the business of insurance, and to leave protection of insurance consumers to state regulation. By reading the boycott exception to reintroduce the full force of the Sherman Act to matters affecting the policyholder-

insurer relationship, the First Circuit sacrifices the policy of the McCarran-Ferguson Act to national antitrust policies which the McCarran-Ferguson Act was intended to render inapplicable to the business of insurance.

The background and objectives of the McCarran-Ferguson exemption were explained by this Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 458-60 (1969):

> "The McCarran-Ferguson Act was passed in reaction to the Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). Prior to that decision, it had been assumed, in the language of the leading case, that '[i]ssuing a policy of insurance is not a transaction of commerce.' *Paul* v. *Virginia*, 8 Wall. 168, 183 (1869). Consequently, regulation of insurance transactions was thought to rest exclusively with the States. In *South-Eastern Underwriters*, this court held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws, in particular, were applicable to them. . . ."
>
> ". . . In context . . . it is relatively clear what problems Congress was dealing with. Under the regime of *Paul* v. *Virginia*, *supra*, States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The *South-Eastern Underwriters* decision threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. . . ."
>
> ". . . Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul* v. *Virginia* held was not 'commerce'. The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' "

There can be no question that the central purpose of the McCarran-Ferguson Act was to render federal law—and specifically the Sherman Act and other antitrust laws—inapplicable to matters affecting the insurer-insured relationship where those matters are regulated by state law. So strong was Congress' intent to remove the federal antitrust laws from this area, that Congress declared a three-year moratorium on the application of the antitrust laws to give the states time to enact regulatory legislation which would permanently preclude the application of the antitrust laws. 15 U.S.C. §1013(a).*

This intent is also reflected in the explanatory comments of Senator McCarran, co-author of the Act:

> "Mr. McCarran. During the moratorium . . . [r]egulatory acts must be enacted by the several States in each of the several States. Otherwise the antitrust acts become effective after January 1, 1948.
>
> Mr. Murdock. But is it not the purpose of the bill and does not the bill accomplish this—
>
> Mr. McCarran. It accomplishes a moratorium for 3 years against the operation of the acts mentioned, namely, the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, as amended, and the Robinson-Patman Antidiscrimination Act.

* As originally enacted, the moratorium was to extend until January 1, 1948. 59 Stat. 34 (1945). In July 1947, the act was amended so as to give the states an additional six months in which to adopt preemptive regulation. 61 Stat. 448.

MR. MURDOCK. So that during the moratorium it is intended, is it not, that the States shall affirmatively step into the regulation of the insurance business?

MR. MCCARRAN. That is correct.

MR. MURDOCK. And it is intended that on the expiration of the moratorium the Sherman Act, the Clayton Act and the other acts mentioned will again become effective except—

MR. MCCARRAN. Except, as the States themselves have provided regulations." (91 Cong. Rec. 1442 (1945).)

On the heels of that exchange, Senator Pepper, an opponent of the Act, questioned whether Congress in fact intended to enact a continuing moratorium on the applicability of the antitrust laws to the business of insurance. Senator McCarran made the point even more forcefully.

"MR. PEPPER: Does that mean that after January 1, 1948, the States may determine whether or not the Sherman and the other acts become applicable to the business of insurance?

MR. MCCARRAN. The answer to that question is 'Yes.' During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, *to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-trust Act,* the Clayton Act, and the other acts. If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable.

. . . The pending bill is for the purpose of creating a moratorium for 3 years in order that the business of insurance shall not be interfered with by any Federal power under either the Clayton Act or the Sherman Act. So during the period of moratorium the various States themselves may take steps to regulate the business of insurance." (91 Cong. Rec. 1443 (1945).) (Emphasis supplied.)

The overriding intent of Congress admits of no doubt. As Congressman Gwynne emphasized, in reporting to the House on the work of the Conference Committee charged with fashioning the final version of the McCarran-Ferguson Act, the Act

> "starts out with the statement that insurance shall be subject to State control. . . . What we are trying to do is to make it clear to the States and to the insurance companies that we are as far as possible removing ourselves from the field." (91 Cong. Rec. 1090 (1945).)

The circumstances of this case demonstrate the sharp conflict between this Congressional purpose and the expansive interpretation of the boycott exception adopted by the First Circuit. Here, that interpretation would permit physicians to inject the federal courts into a controversy between policyholders and insurance companies concerning the terms of medical malpractice insurance coverage, even though Rhode Island has undertaken specific regulatory measures addressed to this issue.

In response to the McCarran-Ferguson Act, Rhode Island enacted an "Unfair Competition and Practices Law," the purpose of which, as stated in its preamble,

> "is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress) [The McCarran-Ferguson Act] by defining, or providing for the determination of—all

> such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (R.I. Gen. Laws §27-29-1, A. 92.)

Certain unfair methods of competition and unfair or deceptive acts or practices are banned outright by Rhode Island law. (R.I. Gen. Laws §§27-29-3, 27-29-4, A. 92.) In addition, the State Insurance Commissioner may define other "unfair methods of competition" or "unfair or deceptive acts or practices" and investigate and proscribe such conduct. (R.I. Gen. Law §27-29-8, A. 103-05.)

Thus, to the extent that any medical malpractice insurance problems are attributable to anticompetitive conduct, Rhode Island has the power to deal with them. However, Rhode Island has shown that it regards the problems affecting medical malpractice insurance to be more complex, and to require more flexible remedies than an antitrust-type decree.

On June 16, 1975, twelve days after the service of plaintiffs' initial complaint in this action, and before service of the amended complaint, the Insurance Division of Rhode Island's Department of Business Regulation promulgated Emergency Regulation XXI (A. 114-27), creating the Joint Underwriting Association. The JUA, as stated in its declaration of findings and purposes, was designed to cope with problems arising from the "lack of [a] competitive stable market for medical malpractice insurance in the State of Rhode Island." (A. 116.) Its basic purpose, as set forth in the regulation, was "to provide for a temporary market to make the necessary medical malpractice insurance available" while allowing time "for the Governor's Commission on Medical Malpratice Reform to make its report, consideration of its recommendations and the enactment of any appropriate and necessary legislation." (*Id.*) Rhode Island has since made the JUA an ongoing agency of the State.*

The First Circuit would now interject a federal court into the study and resolution of the medical malpractice insurance problem through a class action antitrust suit seeking broad equitable relief regulating the conduct of all carriers selling malpractice insurance in Rhode Island. The result would be to establish the District Court as a parallel agency for the regulation of medical malpractice insurance in Rhode Island. This could hamper Rhode Island's freedom to resolve the problems addressed by the JUA and may impose federal antitrust policies which conflict with differing insurance regulatory goals.**

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* On January 12, 1976, Rhode Island enacted legislation specifically ratifying the JUA, R.I. Gen. Laws §42-14.1-1. (A. 106-12.) On April 9, 1976, Emergency Regulation XXI (A. 114-27) was superseded by current Regulation XXI (A. 141-60), making the JUA an ongoing agency.

** The potential for conflict is analogous to that recognized by this Court in *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975). There, upholding a claim that regulation by the SEC immunized members of the stock exchange from "price fixing" allegations arising from self-imposed commission regulations, even without an express exemption, the Court said that:

> "[T]o deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. . . . Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." (422 U.S. at 689.)

The same difference in perspective exists between federal antitrust policy and state insurance regulation, as was recognized by Senator Ferguson in debates preceding passage of the Act. (91 Cong. Rec. 1481, Col. 2 (1945).)

The potential for conflict in this case is evident from the face of the amended complaint. Plaintiffs seek injunctive relief which would require defendants to issue "occurrence" basis policies at reasonable rates and, perhaps, damages for the refusal to issue such policies in the interim. Yet the JUA, of which the defendant companies are members, is authorized to issue policies on either a "claims made" or "occurrence" basis as it deems appropriate.

Further, rates for medical malpractice insurance issued by the JUA or otherwise must be approved by the Insurance Department in accordance with standards of reasonableness provided by Rhode Island law. (R.I. Gen. Laws §§27-9-4, A. 86; 42-14.1-1(c), A. 107; Emergency Regulation XXI, §5, A. 120.) No other rate can be charged. Yet the relief which plaintiffs seek would substitute the judgment of the federal court for that of the State Insurance Department as to what constitutes a reasonable rate.

The same problem is raised by plaintiffs' demand for treble damages, apparently based on the alleged difference between what they claim would be a competitive rate and rates which either were approved by Rhode Island prior to creation of the JUA or have been established by the JUA since it began operations. To grant such relief would amount to a rebate from the rates established by Rhode Island. Notably, the First Circuit recognized this conflict in affirming the District Court's decision to abstain from deciding plaintiffs' state-law claims seeking restitution of allegedly excessive premiums. In so doing, the First Circuit stated that "recognizing a cause of action for the recovery of excessive past insurance premiums would profoundly affect the state's ratemaking machinery

and policies." (555 F.2d at 13, A. 69.) Precisely the same result will follow if the First Circuit's sweeping construction of the boycott exception is permitted to remain unaltered.

The First Circuit majority maintained that its reading of the boycott exception would not be inconsistent with the goals of the McCarran-Ferguson Act, but it implicitly recognized that under its reading the Act would no longer provide a meaningful shield against application of the Sherman Act to areas regulated by state law. Brushing aside the concerns of other courts that such an expansive reading of the exception would vitiate the policy of the McCarran-Ferguson Act to leave regulation of insurer-insured relations to the states, the First Circuit asserted that the doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943), is sufficient protection because it would still permit the states specifically to authorize conduct otherwise proscribed by the Sherman Act. (555 F.2d at 8, A. 60.) In thus recognizing that its expansive interpretation of the boycott exception would leave the business of insurance only with the uncertain umbrella of *Parker* v. *Brown,** the First Circuit rendered the McCarran-Ferguson exemption superfluous.

But Congress was not engaged in an academic exercise when it enacted the McCarran-Ferguson antitrust exemption. Congress was aware of *Parker* v. *Brown.* The Department of Justice, in fact, opposed passage of the McCarran-Ferguson antitrust exemption on the ground that

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* *See Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975); *Bates* v. *State Bar of Arizona,* 97 S.Ct. 2691 (1977), which suggest that it is far from clear that even state-sanctioned conduct would be exempt from the Sherman Act under *Parker* v. *Brown.*

Parker v. *Brown* afforded a sufficient exemption for protection of state regulation. Congress disagreed. In enacting the McCarran-Ferguson Act, Congress intended to afford the states a broader exemption and, as the legislative history shows, to withdraw the Sherman Act from the business of insurance where the states have enacted regulation in the field.

Justice Blackmun's concurring opinion in *Cantor* describes this history as follows:

> "The McCarran-Ferguson Act was passed in reaction to the holding in *United States* v. *Underwriters Assn.*, 322 U.S. 533 (1944), that the business of insurance is 'commerce' within the meaning of the Sherman Act. Congress' expressed concern was that the application of that Act would 'greatly impair or nullify the regulation of insurance by the States,' bringing to a halt their 'experimentation and investigation' in the area. The Act was vigorously endorsed by governors and insurance commissioners of 'almost all of the States.' The Justice Department, in opposing the McCarran-Ferguson Act, specifically argued that *Parker* v. *Brown,* 317 U.S. 341 (1943), made the legislation unnecessary because it immunized the insurance business insofar as it was regulated by the States. Congress was not so sure:
>
> " '*Parker* v. *Brown* dealt with a State commission authorized by State statute to enforce a program in conformity with, if not supplementary to, a Federal statute. Obviously, all State regulation concerning insurance does not and would not fall in such a category.' S. Rep. No. 1112, 78th Cong., 2d Sess., 2, 5-7 (1944). See also S. Rep. No. 20, 79th Cong., 1st Sess., 1-3 (1945); H.R. Rep. No. 873, 78th Cong., 1st Sess., 7 (1943); H.R. Rep. No. 143, 79th Cong., 1st Sess., 4 (1945)" (428 U.S. at 608 n. 4.)

Moreover, this Court has held that under the McCarran-Ferguson Act the state regulation which precludes the application of federal law is not limited to regulation specifically authorizing the conduct challenged. *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958). Hence, a construction of the boycott exception which would exempt the business of insurance from the Sherman Act only to the extent permitted by *Parker* v. *Brown,* or only where the conduct is specifically authorized by the state, is squarely inconsistent with both the history and this Court's interpretation of the McCarran-Ferguson Act.

In sum, the First Circuit's interpretation of the boycott exception nullifies the express Congressional purpose to withdraw the Sherman Act from the business of insurance where the states have enacted regulatory legislation. As Judge Campbell pointed out, it "introduces a new category of federal antitrust suit" which "could have unforeseeable effects upon state regulatory policies." (555 F.2d at 15, A. 75.) It would enable policyholders to convert grievances concerning the terms of their insurance policies into federal antitrust claims and, for the first time since the enactment of the McCarran-Ferguson exemption more than thirty years ago, it would thrust upon the federal courts a consumer protection role heretofore exercised exclusively by state insurance departments.

This radical change finds no support in the language or history of the Act. It should be rejected in favor of the more limited constructions which are necessary to give meaning to the McCarran-Ferguson antitrust exemption.

Conclusion

For these reasons, the First Circuit's judgment should be reversed and the antitrust allegations of the amended complaint should be dismissed.

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